Decision in CPLR Article 78 proceedings - Reyes, Richard

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

In the Matter of the Application of

RICHARD REYES, #92-A-3672

Petitioner,

DECISION, ORDER and JUDGMENT

-against-

Index No. 1674/2017

TINA M. STANFORD, Chair of the
NEW YORK STATE BOARD OF PAROLE,

Respondent.

HON. PETER M. FORMAN, Acting Supreme Court Justice

The following papers were read and considered in deciding this petition:

	PAPERS NUMBERED
NOTICE OF PETITION	**1**
VERIFIED PETITION	**2**
EXHIBITS	**3-11**
ANSWER AND RETURN	**12**
EXHIBITS	**13-24**
REPLY AFFIRMATION	**25**

This Article 78 proceeding challenges a decision of the New York State Division of Parole (the "Board") denying Petitioner's second application for release to parole supervision. For the reasons stated herein, the Petition is denied.

BACKGROUND

On February 20, 1992, Petitioner was convicted after jury trial of Murder in the Second Degree, Criminal Possession of a Weapon in the Second Degree, Attempted Robbery in the First

Degree, and Attempted Robbery in the Second Degree. This conviction arose from the botched robbery of an auto repair shop in Queens. During the course of that attempted robbery, Petitioner's accomplice shot and killed the store owner.

On April 16, 1992, Petitioner was sentenced to a period of imprisonment of 25 years to life on the murder conviction. Defendant was also sentenced to a concurrent period of imprisonment of 7½ years to 15 years on the Criminal Possession of a Weapon in the Second Degree and Attempted Robbery in the First Degree convictions. Finally, Defendant was sentenced to a concurrent period of imprisonment of 3½ years to 7 years on the Attempted Robbery in the Second Degree conviction. That conviction was subsequently affirmed. [People v. Reyes, 204 AD2d 361 (2d Dept. 1994), *app. denied* 83 NY2d 971 (1994)].

Petitioner's second application for release to parole supervision was heard by the Board on February 14, 2017. During that interview, the Board considered the circumstances and severity of Petitioner's crime. Although Petitioner was not the shooter in this felony murder case, Petitioner accepted full responsibility for his actions during the parole interview.

The Board also considered Petitioner's prior criminal history as a juvenile offender, which included three felony robbery arrests that were prosecuted in Kings County Family Court. The Board also considered Petitioner's prior criminal history as an adult. Although Petitioner was only 18 years old when he participated in the murder for which he is currently imprisoned, his prior criminal history as an adult already included an Attempted Robbery in the Second Degree conviction, and misdemeanor assault and drug convictions.

The Board also considered Petitioner's institutional record, including his disciplinary infractions, his program accomplishments, and his release plan. With respect to his disciplinary history, the Board noted that Petitioner had an extensive history of disciplinary infractions during

his first 17 years in prison, including 28 Tier II infractions, and 16 Tier III infractions. However, the Board also noted that Petitioner's disciplinary history has greatly improved in the last ten years, that his last violent conduct infraction was committed in 2006, that his last Tier III infraction was committed in 2009, and that he has not been charged with any infractions over the last eight years. The Board provided Petitioner with the opportunity to discuss his efforts at achieving personal growth during his time in prison, and to explain how those efforts contributed to his improved disciplinary history.

The Board spent considerable time speaking with Petitioner about his program accomplishments, with particular emphasis on the significant positive influences and benefits that Petitioner realized through his participation in the Merrill Cooper and Rising Hope programs. The Board also discussed Petitioner's work as an inmate mobility assistant for the sensorially disabled, his academic achievements, his work in prison ministry and human services, and his participation in substance abuse treatment programs.

The Board also reviewed and considered the COMPAS risks and needs assessment that had been prepared as required by the Executive Law. The Board noted that Petitioner scored a 5 out of 10 for risk of felony violence, but that he was also scored as a low arrest risk and a low abscond risk. The Board also noted that Petitioner's history of violence was high, and that re-entry substance abuse was deemed highly probable.

The Board also reviewed Petitioner's release plan, including the job that he had lined up as a car service dispatcher, and his plan to reside with his wife. The Board also reviewed letters of support that Petitioner has received from family members, political leaders, and program instructors. The Board also reviewed letters that it has received from the District Attorney's Office that prosecuted him, and the defense attorney who represented him at trial.

Near the end of the parole interview, the Board provided Petitioner with the opportunity to provide any additional information that he might want to share in connection with his application for release to parole supervision. After listening to Petitioner's personal statement, the Board thanked Petitioner, and acknowledged that Petitioner had "given us a lot to think about." Finally, the Board promised that it would make a decision based upon the statutory criteria, and based upon all of the information that Petitioner had provided during the hearing.

The Board ultimately denied Petitioner's application for release to parole supervision. Specifically, the Board acknowledged that Petitioner had made significant efforts toward rehabilitation, including his participation in the Merrill Cooper and Rising Hope programs and his work as a mobility assistant. The Board also noted Petitioner's improved disciplinary history, and his official and community letters of support. The Board also reviewed the facts underlying Petitioner's conviction, his sentencing minutes, his prior criminal history, and a letter of opposition that had been submitted by the Queens County District Attorney's Office.

While the Board commended Petitioner's personal growth and productive use of time, the Board also recognized that an inmate does not automatically qualify for release on parole as a reward for good conduct. In denying Petitioner's second application for release to parole supervision, the Board stated:

> After deliberating, reviewing your overall record and weighing the statutory factors discretionary release is not presently warranted as your release would trivialize the tragic loss of life that you caused and furthermore would be incompatible with the welfare of society and would so deprecate the serious nature of your crimes as to undermine respect for the law.

On April 25, 2017, Petitioner perfected his administrative appeal from that denial. On June 26, 2017, the Appeals Unit denied Petitioner's appeal. This Article 78 proceeding ensued.

DISCUSSION

"A parole determination may be set aside only when the determination to deny the petitioner release on parole evinced 'irrationality bordering on impropriety.' " [Matter of Goldberg v. New York State Board of Parole, 103 AD3d 634, 634 (2d Dept. 2013) *quoting* Matter of Martinez v. New York State Division of Parole, 73 AD3d 1067, 1067 (2d Dept. 2010). *See also* Matter of Silmon v. Travis, 95 NY2d 470, 476 (2000); Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 (1980)]."The burden is on the petitioner to make a convincing demonstration of entitlement to such relief." [Matter of Duffy v. New York State Division of Parole, 74 AD3d 965, 966 (2d Dept. 2010). *See also* Matter of Goldberg v. New York State Board of Parole, 103 AD3d 634, 635 (2d Dept. 2013); Matter of Midgette v. New York State Division of Parole, 70 AD3d 1039, 1040 (2d Dept. 2010)].

There is no merit to Petitioner's claims that the Board improperly denied his application based solely on the facts underlying his conviction, and that the Board failed to properly consider the COMPAS risk and needs assessment. Pursuant to Executive Law § 259–i(2)(c), the Board "is required to consider a number of statutory factors in determining whether an inmate should be released on parole." [Matter of Goldberg v. New York State Board of Parole, 103 AD3d 634, 634 (2d Dept. 2013), *quoting* Matter of Gelsomino v. New York State Board of Parole, 82 AD3d 1097, 1098 (2d Dept. 2011)]. "The Parole Board is not required to give equal weight to each statutory factor, and it is not required to 'articulate specifically each factor in its determination.'"[Matter of Stanley v. New York State Div. of Parole, 92 AD3d 948, 948 (2d Dept. 2012), *quoting* Matter of Huntley v. Evans, 77 AD3d 945, 947 (2d Dept. 2010). *See also* Matter of Thomches v. Evans, 108 AD3d 724, 724 (2d Dept. 2013); Matter of Angel v. Travis, 1 AD3d 859, 860 (3d Dept. 2003) ("It should be noted that although the Board articulated the most

compelling factors influencing its decision, it was under no obligation to discuss every factor it considered"]. "Notably, parole need not be granted as a reward for good conduct, nor as a quid pro quo for participation in recommended DOCS programs." [People ex rel. Germenis v. Cunningham, 73 AD3d 1297, 1298 (3d Dept. 2010). *See also* Matter of Mentor v. New York State Division of Parole, 87 AD3d 1245, 1246 (3d Dept. 2014); Matter of Gutkaiss v. New York State Division of Parole, 50 AD3d 1418, 1418 (3d Dept. 2008)].

The Board is also "entitled to place greater emphasis on the serious nature of the crimes over the other factors" [Matter of Vigliotti v. State Executive Division of Parole, 98 AD3d 789, 790-91 (3d Dept. 2012)], including the violent nature of that crime. [Matter of Angel v. Travis, *supra* at 860, *quoting* Matter of Lue-Shing v. Pataki, 301 AD2d 827, 828 (3d Dept. 2003). *See also* Matter of Patterson v. Evans, 106 AD3d 1456 (4th Dept., May 3, 2013); Matter of MacKenzie v. Evans, 95 AD3d 1613, 1614 (3d Dept. 2012)]. It is also within the Board's discretion to conclude that the severity of an inmate's offense outweighs an inmate's positive institutional record and his letters of support. [Matter of Cardenales v. Dennison, 37 AD3d 371, 371 (1st Dept. 2007) (denial of application for release to parole supervision was not arbitrary and capricious, even though the petitioner had an exemplary institutional record and had received many letters of support, including a letter of support from the victim's mother). *See also* Matter of Anthony v. New York State Division of Parole, 17 AD3d 301, 301 (1st Dept. 2005); Matter of Kirkpatrick v. Travis, 5 AD3d 385, 385-86 (2d Dept. 2004)].

Here, the Board properly considered and reviewed the circumstances and severity of Petitioner's crimes, his institutional record, his program accomplishments, his release plan, and his letters of support and opposition. Contrary to Petitioner's assertions, the Board also properly incorporated the COMPAS risk and needs assessment in its determination as required by

Executive Law §259-c(4) and §259-i(2)(c)(A). Although the COMPAS assigned Petitioner low arrest and abscond risk scores, it also assigned a high probability to the risk of substance abuse. [Matter of Wade v. Stanford, 148 AD3d 1487, 1488 (3d Dept. 2017)]. In any event, Petitioner's COMPAS scores are not dispositive. [*see* Matter of Dawes v. Annucci, 122 AD3d 1059, 1060-61 (3d Dept. 2014) ("Although petitioner's COMPAS Risk and Needs Assessment Instrument indicated that he was at a low risk for violence, rearrest and absconding, the COMPAS instrument is only one factor that the Board is required to consider"). *See also* Matter of Rivers v. Evans, 119 AD3d 1188 (3d Dept. 2014); Matter of Rivera v. New York State Division of Parole, 119 AD3d 1107 (3d Dept. 2014); Matter of Williams v. New York State Division of Parole, 114 AD3d 992 (3d Dept. 2014)].

Petitioner also asserts that the Board improperly considered community opposition to his application for release to parole supervision. As a preliminary matter, the Court concludes that community opposition is an appropriate factor that the Board may take into consideration when reviewing an application for discretionary release to parole supervision. [9 NYCRR§8000.5(c)(2) ("it is essential... to permit private citizens to express freely their opinions for or against an individual's parole). *See also* Executive Law §259-i(2)(c)(B) ("Where a crime victim... or other person submits to the parole board a written statement concerning the release of an inmate, the parole board shall keep that individual's name and address confidential")].

In any event, although the decision denying Petitioner's application states that the Board considered "official and community opposition as well as official support," an *in camera* review reveals that the Board only received letters of community support, and not of community opposition. To the extent that the Board mistakenly indicated otherwise when it announced its decision, there is no basis to conclude that this misstatement affected the Board's decision in a

meaningful way. [Matter of Mercado v. Evans, 120 AD3d 1521 (3d Dept. 2014); Matter of Singh v. Evans, 107 AD3d 1274, 1275 (3d Dept. 2013)]. The Court also finds that the letter of official opposition that was received from the Queens County District Attorney's Office was properly considered by the Board [Matter of Grigger v. New York State Division of Parole, 11 AD3d 850, 853 (3d Dept. 2004)].

Ultimately, "whether the Board considered the proper factors and followed the proper guidelines are questions that should be assessed based upon the 'written determination evaluated in the context of the parole hearing transcript.'" [Matter of Jackson v. Evans, 118 AD3d 701 (2d Dept. 2014), *quoting* Matter of Siao-Pao v. Dennison, 11 NY3d 777, 778 (2008). *See also* Matter of Fraser v. Evans, 109 AD3d 701 (2d Dept. 2013); Matter of Galbreith v. New York State Division of Parole, 58 A.D.3d 731 (2d Dept. 2009)]. In the context of that transcript, there is no merit to Petitioner's claim that the Board failed to provide a sufficient explanation of the reasons supporting its determination [Id. at 702. *See also* Matter of Fraser v. Evans, 109 AD3d 701 (2d Dept. 2013); Matter of Galbreith v. New York State Division of Parole, 58 AD3d 731 (2d Dept. 2009)].

Therefore, under the relevant standard of review, the Board's denial of Petitioner's second application for release from confinement was neither arbitrary nor capricious, and the Board did not act as a sentencing judge when it denied that application [Matter of LeGeros v. New York State Board of Parole, 139 AD3d 1068 (2d Dept. 2016); Matter of Ramos v. Heath, 106 AD3d 747 (2d Dept. 2013); Matter of Davis v. Evans, 105 AD3d 1305 (2013); Matter of Rodriguez v. Evans, 102 AD3d 1049, 1050 (3d Dept. 2013)]. There is also no evidence that the Board's determination was irrational to the point of bordering on impropriety. [Matter of Cruz v. New York State Division of Parole, 39 AD3d 1060, 1062 (3d Dept. 2007) (stating that while the court

found the petitioner's "academic and institutional achievements exemplary," and that the court considered the petitioner to be "a prime candidate for parole release," the Board's decision to deny parole would be upheld because it did not exhibit "irrationality bordering on impropriety"). *See also* Matter of Thomches v. Evans, 108 AD3d 724, 724-25 (3d Dept. 2013); Matter of Rivera v. New York State Division of Parole, 95 AD3d 1586, 1587 (3d Dept. 2012); Matter of Murray v. Evans, 83 AD3d 1320, 1321 (3d Dept. 2011)].

Finally, there is no merit to Petitioner's claim that his procedural and substantive due process rights were violated [Matter of Freeman v. New York State Division of Parole, 21 AD3d 1174 (3d Dept. 2005)]. Because Petitioner's remaining contentions are also without merit, it is hereby

ORDERED, ADJUDGED AND DECREED that the Verified Petition is denied, and that this Article 78 proceeding is dismissed.

The foregoing constitutes the Decision, Order and Judgment of this Court.

Dated: Poughkeepsie, NY
September 21, 2017

Peter M. Forman

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ACTING SUPREME COURT JUSTICE

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